IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 18 OF 2005

Sou.Mangal Hanmant Mane & anr. ... Appellants.

Versus.

Vishwas Ganapti Mane. ... Respondent.

Shri V.Y.Jadhav for the Appellants.

Shri Dnyaneshwar Deshmukh for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 28th March, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The order impugned is dated 16th September 2004 by which the learned District Judge, Satara has passed an order of remand in appeal preferred by the Respondent/original Defendant.

2. The suit was filed by the Appellants against the Respondent praying for declaration that the Appellants are the owners of the property described in paragraph 1 of the plaint and for perpetual injunction. The learned trial Judge decreed the suit by holding that the Appellants have established exclusive title over the suit property. In an Appeal preferred by the Respondent an order of remand has been passed. One of the grounds on which the order of remand is passed is that proper issues are not framed on the basis of the contentions raised by the Respondent/Defendant. Another ground is

that the application for amendment of the plaint made by the Appellants has been rejected. While passing the order of remand, the learned District Judge has granted liberty to both the parties to apply for amendment of the plaint and if the applications for amendment of the pleadings are allowed, the learned trial Judge is directed to frame additional issues. The learned Appellate Court observed that proper issues are not framed. The learned Judge did not decide the application for amendment made by the Respondent at Exh.36 in the pending appeal.

3. The learned Counsel appearing for the Appellants submitted that there was no warrant for passing the order of remand. The Appellants had not made any grievance regarding rejection of the application for amendment of the plaint at Exh.126 and in fact it was not the case of the Appellants that the said order was bad-in-law. He submitted that the issue No.1 framed by the trial Court covered even the contentions raised by the Respondent. He submitted that without considering the merits of the application for amendment of the Written Statement filed by the Respondent, the order of remand could not have been passed.

4. The learned Counsel appearing for the Respondent has supported the judgment and order by pointing out various findings recorded by the learned District Judge. He

submitted that as a result of the order of remand, even the Appellants can apply for amendment including the amendment which was sought by the Application at Exh.126. He submitted that if the amendment to the Written Statement is allowed, the parties will have to lead additional evidence and therefore no interference is called for with the order of remand.

5. I have considered the rival submissions. In paragraph 25 of the impugned Judgment and Order, the learned Appellate Judge has referred to the application for amendment made by the Appellants at Exh.126. The said application for amendment was rejected by the learned trial Judge. No grievance was made by the Appellants in the Appeal as regards the rejection of the said application. The learned Counsel appearing for the Appellants stated before me that the Appellants are not interested in assailing the order passed on the application at Exh.126. Therefore, the rejection of the application for amendment of the plaint cannot be a ground for passing the order of remand as the Appellants have accepted the order passed on the said application. If the Respondent was interested in relying upon any of the factual averments made in the application for amendment of the plaint made by the Appellants, the Respondent could have always pointed out relevant averments in the said application at the time of hearing of the Appeal.

6. In paragraph 26 of the impugned Judgment and Order the learned Judge has observed that the learned trial Judge has not framed issues on the basis of the contention raised by the Respondent. The learned Judge has pointed out that a case was made out by the Appellants in the Application for amendment at Exhibit 126 that there was an earlier partition and the case of the Respondent was based on the contention that the suit properties are joint properties. The learned District Judge has criticised the learned trial Judge for considering the contention based on the jointness of the property without there being any pleading and without there being any issue. The issue No.1 framed by the trial Court read thus:

> (1) Do the Plaintiffs prove their exclusive title and possession over the suit property?

It is pertinent to note that while considering the said issue of title and possession of the Appellants, the learned trial Judge was required to consider the case made out by the Respondent/Defendant and accordingly the said case has been considered by the learned trial Judge. A contention was raised by the Respondent in the Written Statement that the suit property was ancestral property. The parties to the suit knew all the issues

involved in the suit and accordingly they have led evidence. When the Appellants had come out with a specific case that they are the exclusive owners and are in exclusive possession of the suit property, the issue based on the said contention naturally covers the contention raised by the Respondent as regards the title to the property in dispute. The learned District Judge has observed in paragraph 26 that it was necessary for the trial Court to allow the amendment of plaint. However, the question of allowing the amendment does not arise as the Appellants/Plaintiffs are not interested in challenging the order passed on the Application at Exh.126. The Appellate Court has observed in paragraph 27 of the Judgment as under:

> "In my opinion, therefore, it will be desirable and in fact it is now absolutely necessary, to remand the suit back to the trial Court allowing the parties to apply for amendment and then leaving it to the trial Court to frame appropriate issues on all the questions and the entire dispute between the parties. As far as the existing pleadings are concerned, it can be definitely said that the trial Court ought to have framed issues on the case put up by the defendants in the written statement."

In my view it was not at all necessary to give liberty to the parties to apply for amendment. The Appellants were not interested in applying for amendment. The Respondent had made application for amendment which was pending before the learned District Judge.

7. Thus if the entire reasoning of the Appellate Court is perused it is obvious that the remand was uncalled for. The Appellate Court at the highest could have considered the question of remand only if the Application made by the Respondent for amendment of the Written Statement was allowed and only if it was found that the parties want to lead further evidence which is lengthy and which cannot be recorded in the Appellate Court. If the learned trial Judge was of the view that a particular issue was arising out from pleadings and was not decided, he could have kept the Appeal pending and called for a finding on that particular issue after framing it.

8. Therefore, in my view the order of remand is unsustainable and the same deserves to be quashed and set aside. Hence the following order is passed:

i) The impugned Judgment and Order dated 16th September 2004 is quashed and set aside and Regular Civil Appeal No.114 of 1999 is restored to file.

ii) The parties will appear before the learned District Judge, Satara, on 25th April 2005 for fixing the date of hearing of the Appeal. Before proceeding with the hearing of the Appeal, the learned Judge will decide the application for amendment made by the Respondent which is at Exh.36.

iii) The learned Judge will hear and decide the Appeal as expeditiously as possible.

iv) All contentions of the parties on merits are expressly kept open.

v) The Appeal is partly allowed in the above terms with no order as to costs.

vi) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.